No. 11118

IN THE

United States Circuit Court of Appeals

For the Ninth District

W. E. BUELL,

Appellant,

vs.

SIMON NEWMAN COMPANY,
a California Corporation, *Appellee.*

APPELLANT'S OPENING BRIEF

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I.

JURISDICTION

This is an appeal to reverse the judgment made and entered by the United States District Court in and for the Northern District of California, Northern Division in favor of the appellee, the defendant in the lower court, and against the appellant, the plaintiff in the lower court. This action was instituted by the appellant as trustee for certain bondholders, he being appointed in a municipal bankruptcy proceeding pending in the District Court of the Northern

District of California, Northern Division. The jurisdiction of the District Court is based upon the fact that the plaintiff is a resident of the state of Oregon, *28 U.S.C. 41(1)*; that there is a federal question involved insofar as the District Court had to determine the authority of a trustee in bankruptcy, *28 U.S.C. 41(1)*, and the plaintiff, being a trustee in bankruptcy, was an officer of the United States Court, *28 U.S.C. 41(1)*. The jurisdiction of the Circuit Court of Appeals to review the judgment of the District Court is based on Title *28 U.S.C.A.225 (a)*, and Rule 73 of the Federal Rules of Civil Procedure.

II.

STATEMENT OF THE CASE

The facts of this case are not in dispute and are substantially as follows:

The Simon Newman Company entered into a crop lease with the Montague Water Conservation District, the latter being an irrigation district located in Siskiyou County, California. The lease is set forth in the Transcript on Pages 5 to 8 inclusive. The pertinent portions thereof are that the District is to receive one-quarter of all the crops upon the leased land as rentals (T6) and the parties further agree that the lease was subject to the terms and conditions of a certain municipal deed regarding adjustment proceeding then pending in the Federal District Court (T7). Thereafter the appellant was appointed trustee by the court and a Plan of Composition was approved. The pertinent portion of this Plan of Composition was as follows: "All income from rents and royalties accruing after December 31, 1943 upon lands now owned by the District shall belong to the bondholders" (T16). Thereafter and in accordance with the Plan of Composition the appellee paid $32,420.00 to the District for the release of the bonded

indebtedness against the leased land. These funds were delivered to appellant (T16) who in turn delivered the appellee a certain release set forth on Pages 11 to 13 of the Transcript. At the time of the payment of $32,420.00, the crop of grain was approximately six inches high and no crops had been harvested upon the land and no crops were in a condition to be harvested. (T16) One quarter of the value of the crop when matured and harvested was $3,327.00.

III.

SPECIFICATION OF ERRORS

A. The Court erred in not granting appellant's motion to strike.

B. The Court erred in finding that the release was a release of appellee's obligation to pay rent.

IV.

ARGUMENT

A. THE RELEASE PLEADED BY THE APPELLEE IS LIMITED TO THE CANCELLATION OF THE BONDED INDEBTEDNESS AND DOES NOT EFFECT THE CONTRACTUAL OBLIGATION BETWEEN APPELLANT AS ASSIGNEE OF THE DISTRICT AND APPELLEE AS THE LESSEE.

In California at least, a lease is more than a grant of interest in real property. It is also contractual in nature and is a contract between the lessor and lessee for possession and use of the property and for consideration of rent. (*Samuels v. Ottinger* (1915) 169 *Cal.* 209, 146 *P.* 638; *Chandler v. Hart* (1911) 161 *Cal.* 405, 119 *P.* 516; *Dean v. Brower* (1931) 119 *Cal. App.* 412, 6 *P. (2d)* 580). Because

of its dual nature, dual obligations are created: " . . . the lease has two sets or rights and obligations—one comprising those growing out of the relation of landlord and tenant, and said to be based on the 'privity of estate', and the other comprising those growing out of the express stipulations of the lease, and so said to be based on 'privity of contract'." *(Samuels v. Ottinger, supra,* 169 *Cal.* 211; *see also Realty etc. Co. vs. Rea (*1920*)* 184 *Cal.* 565, 194 *Pac.* 1024; *Bonetti v. Treat (*1891*)* 91 *Cal.* 223, 27 *P.* 612). The lease is construed according to the rules for interpretation of contracts generally. *(Kurihara v. City Market (*1928*)* 90 *Cal. App.* 374, 265 *P.* 987; *Barron Estate Co. v. Waterman (*1916*)* 32 *Cal. App.* 171, 162 *P.* 410; *Lang v. Pac. Brewing etc. Co. (*1919*)* 44 *Cal. App.* 618, 187 *P.* 81).

A perusal of the release given by appellant shows that there is no release of a contractual obligation and no release running to any one in personom but that the release specifically releases certain lands from an obligation implied in law.

B. The purchase of the land did not merge the fee and the right to collect the rent.

In order to determine the effect of the purchase of the land by the appellee we must determine the rights of the parties as of the date of the signing of the composition agreement and the signing of the lease. The composition agreement as we said above provides that all income from rents and royalties accruing after December 31, 1943 upon lands now owned by the district belongs to the bondholders; there is no question that these lands belonged to the district upon the date of the signing of the composition agreement and upon the date of its approval. It is set forth in the schedule attached to the agreement as belonging to the district; they belonged to the district after December 31, 1943 and until their purchase by Simon Newman Company in May of 1944.

At the time of the lease Simon Newman Company acknowledged that the lease was taken in contemplation of the composition agreement; at the time the lease was executed the rents began accruing. The word "accruing" defined in Black's Law Dictionary, Third Edition is as follows:

> "ACCRUING. Inchoate; in the process of maturing. That which will or may, at a future time, ripen into a vested right, an available demand, or an existing cause of action. Cochran v. Taylor, 13 Ohio St. 382."

There is no question that the rents were in the process of maturing during the entire year 1944 both before and after the sale. There is no question but that rents may be assigned without the consent of the lease holder; Section 1111 of the Civil Code reads as follows:

"Grants or Remainders or Reversions - Attornment - Rent.—Grants of rents or of reversions or of remainders are good and effectual without attornments of the tenants; but no tenant who, before notice of the grant, shall have paid rent to the grantor, must suffer any damage thereby. *Leg. H.* 1872."
See also Dreyfus v. Hirt, 82 *Cal.* 621; *Castro v. Barry*, 79 *Cal.* 443; *Title Ins. Etc. Co. v. Pfenninghausen*, 57 *Cal. App.* 655.

If a severance of the rents have been made it will not pass to the grantee by deed. *See cases cited in Delvin on Real Estate, Third Edition, Volume* 2, *Page* 1613. In addition as stated above, regardless of the question of severance, there was a contractual obligation which specifically contributed the composition agreement. The appellee is not an innocent purchaser, it went into this transaction with its eyes open; it knew that it was liable for the rent and the bondholders are entitled to the rent.

CONCLUSION

In conclusion it may be said that the lower court apparently attempted to ascertain the intent of the parties by what it thought the contract should be rather than by ascertaining what the contract actually was, as shown by the written exhibits.

Dated, Yreka, California,

October 25, 1945.

Respectfully submitted,

J. Everett Barr,

Attorney for Appellant.